

REMARKS

As a preliminary, allowance of applicant's claims 1-14 is respectfully noted and fully appreciated. We turn next to the rejection of claims 15-18.

Applicant most respectfully requests reconsideration of the rejection advanced in the Official Action of 11/17/2004. That rejection applies four references, each considered below, to reject applicant's claims 15-18.

Applicant's Claims 15-18 Inclusive

Each of these claims specifies various novel features and elements and how they are related to other features and elements. One such feature or element common to claims 15-18 is that at (ii)(A) in claim 15, namely:

“a mounting bracket having an elongated floor panel with a fastener hole extending vertically therethrough as well as upright flanges for supporting at least one hull roller and at least one downward stabilizer flange adapted to be received within the slot of said channel rail”.

The structure of the mounting bracket is strange to all known prior art.

Re Smith (5,449,247)

The Official Action recognizes that Smith places his elements in strange positions compared to applicant's but more importantly, the Official Action full well recognizes that Smith (a) lacks applicant's pair of elongated rails, (b) lacks applicant's slot, and (b) lacks any reason to even consider the idea of applicant's rails, slot, bracket, and fastener.

Crifase et al. (6,327,990) — herein “Crifase”

Crifase deals with stake-spaced and stake-mounted roller assemblies that are not at all relevant to applicant’s claims.

This reference seems to be cited for the purpose of showing a pair of roller frames or channel rails, and cross beams. According to the Official Action, “internal recesses” and “a longitudinal slot” are allegedly shown by Crifase, but applicant respectfully protests the distortion of Crifase by using terms from applicant’s claims 15–18 without giving the terms the same meaning as in applicant’s claims. Obviously, the mere U-shaped channels of Crifase lack the longitudinal slot of applicant with downwardly directed lip flanges, lack the lock recesses of applicant, and lack other features and relationships of applicant.

To argue that Crifase shows any slot at all related to applicant’s constitutes a grave distortion of Crifase and a failure to recognize the nature of applicant’s slot.

Van Gijssel et al. (6,298,426) — herein “Van Gijssel”

Here, the Official Action asserts that Van Gijssel shows mounting bracket 10. It takes but a glance at Van Gijssel to recognize that the so-called mounting bracket 10 of Van Gijssel contains not the slightest suggestion for any upright flanges to support anything, much less hull rollers as in applicant’s claims at issue. What the Official Action calls a “bracket” is called a connector by Van Gijssel. Even more important is the fact that Van Gijssel shows a threaded rod 16 projecting extraordinarily upward from the part called a bracket in the Official Action — a rod 16 on which Van Gijssel upwardly mounts other things. But Van Gijssel never

upwardly mounts anything on what the Official Action calls bracket 10.

The true teaching of Van Gijsel is that of a rod and strut, not at all something for a person of ordinary skill to consult for a watercraft ramp.

The Van Gijsel patent is non-analogous art. See for example, the last previous response by applicant (to the then-outstanding Official Rejection), and particularly note *In re Clay*, 23 USPQ2d 1058, 1060 (Fed. Cir. 1992) where the court held that the gel treatment to get oil out of the ground was not analogous to a gel treatment to prevent loss of stored oil.

Van Gijsel has nothing to commend the attention of anyone of ordinary skill interested in creating a watercraft ramp of simplicity and extraordinarily effectiveness.

Note also, please, *In re Deminski*, 230 USPQ 313, 315–316 (Fed. Cir. 1986), where the Board argued that if one were to follow a common practice of attaching a valve stem to a valve structure, the valve assembly would be removable as a unit; but the court pointed out that the Board had to have used improper hindsight analysis in order to come to that conclusion and emphasized that there was nothing to suggest the desirability of doing so in the prior art. Conjured hindsight is like a killer piranha; it indiscriminately destroys everything.

Here, as in *Deminski*, nothing suggests the desirability or motivation for any person or ordinary skill to consult Van Gijsel. And even if Van Gijsel were consulted, nothing would be gained relevant to applicant's bracket and its relationships.

Young (3,146,599)

Young shows packaging of components.

The Combination

What the Official Action does in combining these four references is:

- A. Modify the watercraft ramp of Smith to provide a pair of elongated channel rails with cross beams from Crifase — (a re-engineering that neither reference suggests and that results in stake-mounted U-shaped rails and cross beams that destroy Smith's adjustability),
- B. Modify the watercraft ramp of Smith to have a slidable Van Gijssel "connector", and then imagining rollers on the Van Gijssel "connector" — (a re-engineering which neither reference suggests or wants and which also destroys the modification purportedly created by Smith and Crifase), and
- C. Create a package of unassembled components in the manner taught by Young — (which is confounding as it ignores the uncertainty and chaos created at aforementioned step B).

By way of summary, the Official Action refers to the "discussed parts" of the four references and concludes that "applicant is merely claiming the capability of assembling the parts to produce a boat ramp assembly."

What is astonishing is that the Official Action violates the well-established principle expressed in *Orthopedic Equipment Co., Inc. v. United States*, 217 USPQ 193, 199 (Fed. Cir. 1983):

It is wrong to use the patent in suit as a guide through the maze of prior art

references, combining the right references in the right way to achieve the result of the claims in suit. Monday morning quarterbacking is quite improper when resolving the question of nonobviousness in a court of law.

The Board offered the following guidance in *Ex parte Levengood*, 28 USPQ2d

1300, 1301, 1302 (PTO Bd. Pat. App. & Int. 1993):

In order to establish a *prima facie* case of unobviousness, it is necessary for the examiner to present *evidence*, preferably in the form of some teaching, suggestion, incentive or inference in the applied prior art, or in the form of generally available knowledge, that one having ordinary skill in the art *would have been led* to combine the relevant teachings of the applied references in the proposed manner to arrive at the claimed invention. [citation omitted]

That which is within the capabilities of one skilled in the art is not synonymous with obviousness. [citations omitted] That one can *reconstruct* and/or explain the theoretical mechanism of an invention by means of logic and sound scientific reasoning does not afford the basis for an obviousness conclusion unless that logic and reasoning also supplies sufficient impetus to have led one of ordinary skill in the art to combine the teachings of the references to make the claimed invention.

Our reviewing courts have often advised the Patent and Trademark Office that it can satisfy the burden of establishing a *prima facie* case of obviousness only by showing some objective teaching in either the prior art, or knowledge generally available to one of ordinary skill in the art, that "would lead" that individual "to combine the relevant teachings of the references". [citations omitted] Accordingly, an examiner cannot establish obviousness by locating references which describe various aspects of a patent applicant's invention without also providing evidence of the motivating force which would impel one skilled in the art to do what the patent applicant has done.

Appropos also is the comment of the Federal Circuit in the case of *In re Fritch*, 972 F.2d 1260, 23 USPQ2d 1780, 1783-1784 (Fed. Cir. 1992), in part quoting from an earlier decision of *ACS Hospital Systems, Inc. v. Montefiore Hosp.*, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984):

“Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under section 103, teachings of references can be combined *only* if there is some suggestion or incentive to do so.” Although couched in terms of combining teachings found in the prior art, the same inquiry must be carried out in the context of a purported obvious “modification” of the prior art. The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.

As put in *In re Randol*, 165 USPQ 586, 588 (CCPA 1970):

Relative to the rejection predicated on 35 U.S.C. 103, we are persuaded that application of the well-settled principle that prior patents are references only for what they clearly disclose or suggest and that it is not proper use of a patent as a reference to modify its structure to one which prior art references do not suggest, calls for reversal of this rejection.

As now well known, Section 103 requires an evaluation of an applicant’s claims by considering them “as a whole.” Likewise, references must be considered in the entire context of their teaching when relying upon Section 103. The point is well summarized in *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 227 USPQ 543, 551 (Fed. Cir. 1985) as follows:

Not only must the claimed invention as a whole be evaluated, but so also must the reference as a whole, so that their teachings are applied in the context of their significance to a technician at the time — a technician without our knowledge of the solution.

Interconnect Planning Corp. at page 547 of 227 USPQ emphasized:

The invention must be viewed not from the blueprint drawn by the inventor but from the state of the art that existed at the time.

The invention must be evaluated not through the eyes of the inventor,

who may have been of “exceptional skill,” but as one of “ordinary skill.”

Most significantly, it is improper to arbitrarily combine separate elements after especially selecting them using the applicant’s teaching as the sole blueprint. See *Arkie Lures Inc. v. Gene Larew Tackle Inc.*, 43 USPQ2d 1294, 1297 (Fed. Cir. 1997) (“It is insufficient to establish obviousness that the separate elements of the invention existed in the prior art absent some teaching or suggestion, in the prior art, to combine the elements.”)

It further should be noted that applicant’s claims at issue, namely 15–18, recite selected elements of structure and various relationships therebetween. Some relationships may have attributes of function but that is not objectionable.

One is sometimes confounded as to whether a relationship is structural or functional. An old case, namely *In re Miller*, 164 USPQ 46 (CCPA 1969) criticized a rejection that was based on lack of structural relationship and emphasized that the law only requires some sort of unobviousness, and that unobviousness can arise from what the case called functional relationships. (In *In re Miller*, the relationship that the examiner criticized was a relationship between a measuring device per se and its volume. The measuring device was for making a smaller quantity of a recipe, such as one-half quantity. To do so, the invention taught formation of a half cup and labeling it as a cup so as to remove the problem of measurement conversion for a person trying to make less than a full quantity.) The court said at page 48 of 164 USPQ:

Here there is a new and unobvious functional relationship between a measuring

receptacle, volumetric *indicia* thereon indicating volume in a certain ratio to actual volume, and a *legend* indicating the ratio, and in our judgment the appealed claims properly define this relationship.

It doesn't matter what kind of relationship is involved; the true issue in assessing unobviousness always is what is different and unobvious in light of the prior art.

Conclusion

In light of the above, it is submitted that the claims at issue, considered as a whole as required at law, most definitely define unobviousness over the prior art.


Applicant therefore most respectfully submits that this application is in condition for allowance and should be allowed.

Early favorable reconsideration and allowance are most courteously solicited.

Respectfully submitted,

Date:

26 January 2005


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